IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1428

TED BUTLER AND EMIL PETERS, ET AL,
Petitioners,

versus

RICHARD C. DEXTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners list three numbered questions presented [Petition for Writ of Certiorari (hereinafter referred to as Petition) at pp. 2-3]. Respondent suggests that the Supreme Court may be assisted by a restatement of the substance of the questions presented by this action as follows:

1. DID THE COURTS BELOW PROPERLY DETERMINE THAT THE PETITIONER'S CONDUCT CONSTITUTED "BAD FAITH, HARASSMENT, AND EXTRAORDINARY CIRCUMSTANCES" SUCH AS TO WARRANT FEDERAL INTERVENTION IN THE FELONY PROSECUTIONS UNDER THE TEXAS "CRIMINAL INSTRUMENT" STATUTE WHERE:

(a) PETITIONERS INITIATED MULTIPLE FELONY PROSECUTIONS AGAINST RESPONDENT DEXTER FOR THE POSSESSION OF AN ORDINARY MOTION PICTURE PROJECTOR ON THE GROUND SAME CONSTITUTED THE POSSESSION OF A "CRIMINAL INSTRUMENT . . . SPECIALLY DESIGNED, MADE OR ADAPTED FOR THE COMMISSION OF AN OFFENSE",

(b) SAME ELEVATED CONDUCT THE STATE LEGISLATURE HAD DESIGNATED A MISDEMEANOR TO A FELONY,

(c) HIGH FELONY BONDS RESULTED,

(d) PETITIONERS COULD NOT HAVE ENTERTAINED ANY REASONABLE

HOPE OF OBTAINING A CONVICTION AS EVIDENCED BY THE CLEAR LANGUAGE OF THE STATUTE, AND

(e) PETITIONERS FAILURE TO PRESENT SAID CHARGES TO A GRAND JURY DURING MORE THAN A YEAR AFTER RESPONDENT DEXTER'S ARREST PRECLUDED VINDICATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS IN STATE COURT.

2. WHETHER *HICKS v. MIRANDA'S* HOLDING THAT "BAD FAITH" SHOULD NOT BE INFERRED SOLELY FROM THE APPLICATION OF AN UNCONSTITUTIONAL STATUTE OR FROM "GOOD FAITH" RELIANCE UPON PRIOR JUDICIAL AUTHORIZATION TO SEIZE FILMS WOULD PRECLUDE FINDING BAD FAITH AS AGAINST PROSECUTING AUTHORITIES WHO:

(a) APPLIED A VALID STATUTE IN A "GROSSLY INAPPROPRIATELY MANNER", SO AS TO FORECLOSE ANY REASONABLE HOPE OF OBTAINING A CONVICTION,

(b) INSTIGATED PROCEEDINGS TO REPEATEDLY FILE FELONY PROSECUTIONS FOR AN OFFENSE WHICH THE LEGISLATURE HAD

DESIGNATED A MISDEMEANOR BY FURNISHING MAGISTRATES MIMEOGRAPHED FORMS WHEREIN THE PORTIONS DESIGNATING ORDINARY PROJECTORS AS "CRIMINAL INSTRUMENTS" AND ORDERING FELONY ARRESTS WAS PART OF THE PRE-PRINTED FORM,

(c) REFUSED TO SEEK INDICTMENTS AGAINST A DEFENDANT SO AS TO PRECLUDE HIM FROM VINDICATING HIS FEDERAL CONSTITUTIONAL RIGHTS IN STATE COURT.

3. WHETHER PROSECUTORIAL IMMUNITY UNDER *IMBLER v. PACHTMAN* PRECLUDES A REMAND TO THE TRIAL COURT TO DETERMINE ATTORNEY'S FEES UNDER THE "ATTORNEYS FEES AWARDS ACT" ON BEHALF OF A "PREVAILING PARTY" AGAINST THE GOVERNMENTAL ENTITIES INVOLVED.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below will affect few other litigants since the statute here in question, the Texas "Criminal Instruments Statute", was amended in 1975, as a result of the District Court Opinion below [see Petition, at p. 3-4 and n. 1] and it is unlikely that any future prosecutor would charge possession of an "ordinary

motion picture projector . . . with interchangeable reels" as a criminal instrument, especially in light of the fact that the State's highest criminal court adopted the opinion of the district court below. *Fronatt v. State* (Tex. Cr. App. 1976) 543 SW2d 140, at p. 142.

2. That the question as to whether immunity would preclude an award of attorney's fees against a governmental unit to the "prevailing party" under the "Attorneys Fees Awards Act" has already been decided by this Court last term in *Hutto v. Finney*, 57 L.Ed.2d 522 (1978), and that any question as to attorney's fees against prosecuting authorities individually was not decided by the court below[1] and is consequently not properly before this court.

STATEMENT OF CASE

As this Court noted on a previous appeal of this case: "The facts of this case are relatively simple". *Butler v. Dexter*, 425 US 262, at p. 263 (1976).

However, the Petitioner's statement of the case does not correctly set forth the facts which indicate bad faith, harassment and prosecution brought "without

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1 In fact the opinion below took great lengths to reiterate that any award of attorney's fees against officials in their individual capacity "must respect the absolute immunity from money damages enjoyed by prosecutors" under *Imbler v. Pachtman*, 424 US 409 (1976). *Universal Amusement Co., Inc. v. Vance* (5th Cir. 1977) 559 F.2d 1286, at p. 1301, affirmed (*en banc*) 587 F.2d 176.

any realistic hope of conviction" and entitlement to attorney's fees. The facts essentially stipulated by the parties hereto in the Court below, were as follows:

USE OF THE FELONY "CRIMINAL INSTRUMENT" STATUTE FOR A SUBSTANTIVE MISDEMEANOR

The Petitioners here arrested and charged Respondent Dexter on successive occasions under Texas' felony "Criminal Instruments" Statute [§16.01 of the Texas Penal Code set forth as Appendix A, hereto][2] for an offense which the Texas Legislature had designated a misdemeanor, "commercial obscenity". [See Admission of Fact, Pre-Trial Order (hereinafter referred to as Admissions), at pp. 5-9]

The "commercial exhibition" of obscene material was made a "Class B Misdemeanor" by the Texas Legislature in 1973 [§43.23 of the Texas Penal Code set forth as Appendix B hereto]. However, the Appellants not only undertook to prosecute Dexter for the misdemeanor offense of "commercial obscenity"[3] but also for the possession of a "criminal instrument" under the pretext that Dexter's possession of "ordinary" motion picture projectors, admittedly used for protected activities, constituted possession of instruments "specially designed, made or adapted for the commission of an offense". Possession of a criminal instrument is a felony [§16.01 of the Texas Penal Code] and provides for much more severe punishment than that for the misdemeanor of "commercial obscenity". Compare the punishment statute [§12.34 of the Texas Penal Code, set forth as Appendix C, hereto] which provides a punishment range of two years to ten years and a fine not to exceed Five Thousand Dollars ($5,000.00) with those of the "commercial obscenity" statute [§12.22 of the Texas Penal Code, set forth as Appendix D, hereto] which provides for confinement not to exceed 180 days and a fine not to exceed One Thousand Dollars ($1,000.00).

It was stipulated between the parties that the projectors at said theatre were "ordinary portable 16 millimeter projectors with removable interchangeable reels" [Admissions, Rec. Vol. III, at p. 328] and were utilized on other occasions to exhibit films that were Constitutionally protected expression and not subject to seizure. [Admissions, Rec. Vol. III, at p. 327].

2 As construed by each of the Courts below:
"Section 16.01 of the Texas Penal Code creates the felony offense of possessing a 'criminal instrument' which the statute defines as 'anything that is specially designed, made, or adapted for the commission of a crime'. As the lower court noted, the statute obviously applies to such items as jimmies and safecracking tools, the possession of which unmistakably indicates that criminal conduct is afoot." *Universal Amusement Co., Inc. v. Vance* (5th Cir. 1977) 559 F.2d 1286, at p. 1294, affirmed (*en banc*) 587 F.2d 176.

3 Respondent Dexter did not challenge or seek to enjoin the misdemeanor charges brought against him under the State's "Commercial Obscenity" Statute, §43.23 of the Texas Penal Code, and same were tried prior to the entry of the District Court's opinion below. See: *Universal Amusement Co., Inc. v. Vance* (S.D. Tex. 1975) 404 F.Supp. 33, at p. 47; *Butler v. Dexter, Supra*, at p. 263.

CHRONOLOGY

On four successive occasions (every four days between June 24, 1974 and July 6, 1974) a San Antonio Police Officer viewed the identical film. "Deep Throat"[4], made a report, and pursuant to an established procedure, a Magistrate held a hearing at the theatre and upon "mimeographed" form motions, affidavits and warrants, provided by Petitioner Butler[5], and on each occasion the Magistrate would find "probable cause" to seize the "same film" as well as the motion picture projectors which were admittedly used for protected speech as well. On each occasion, the Magistrate's "mimeographed" warrant provided by Petitioner Butler provided in the verbiage already mimeographed on the form directions for the officers to seize and "confiscate" these ordinary portable 16 millimeter projectors as "criminal instruments" pursuant to the felony provisions of §16.01 of the Texas Penal Code. [Admissions, Rec. Vol. III, at p. 335-336].

On three of these occasions Dexter was arrested and charged with the possession of a "criminal instrument"

4 The stipulated facts revealed that on each successive occasion the "same film" was viewed and seized [Admissions, at p. 6].

5 These mimeographed forms provided by Petitioner Butler were such that the Magistrate had only to fill in the date, time and place, the remaining verbiage was provided on the mimeographed form, including the Order to Seize not only the film but to "confiscate the criminal instruments" such as "motion picture projectors" as well. [Admissions, Rec. Vol. III, at pp. 330-336 and Transcript of Hearing before Three Judge Panel on November 15, 1974, Rec. Vol. III, at p. 121, l. 6-9].

[§16.01 of the Texas Penal Code], a felony, and "commercial obscenity" [§43.23 of the Texas Penal Code], a misdemeanor. [Admissions, Rec. Vol. III, at pp. 322-326]. Accordingly, high felony bonds were required[6] and Petitioners filed complaints in both the misdemeanor and felony cases. However, while the misdemeanor cases for "commercial obscenity" were brought to trial, Petitioners failed to ever present the felony "criminal instrument" cases to a Grand Jury during the entire one year that transpired between Dexter's arrests and the decision of the District Court below.

This failure to seek grand jury indictments on the felony charges against Dexter frustrated any attempt by Respondent to adjudicate these Constitutional claims in state court, undermining the very purpose of the *Younger* abstention doctrine.

Petitioner Butler now claims that his office "prepared and filed felony complaints [under the "Criminal Instruments Statute] . . . [P]ursuant to the magistrates order" [Petition at pp. 6-7], that his office "filed the felony charges at the behest of the Magistrate" [Petition at p. 26], merely "following the orders of Magistrates" [Petition at p. 27] in apparent support of his argument that such action was based "on a good faith reliance" upon prior "judicial authorization" [Petition at pp. 13-14].

6 Bonds of $25,000 and $5,000 were made by Dexter and another bond of $25,000 was reduced to $1,000 [Admissions, Rec. Vol. III, at pp. 322-326].

However, Petitioner Butler can hardly now claim to have relied in "good faith" upon prior judicial authorization, as it was Petitioner who initiated these proceedings and, utilizing an almost identically verbatim "scenario",[7] provided the magistrate with mimeographed form orders containing verbiage mimeographed as part of the form directing the officers to seize the projectors as "criminal instruments" and to arrest the Defendant on felony charges [Admissions, Rec. Vol. III, at pp. 330-336 and Transcript of Hearing Before Three Judge Panel on November 13, 1974, Rec. Vol. VIII, at p. 121, l. 6-9]. On one occasion the Magistrate even had to inquire of the Assistant District Attorney as to which particular crime to charge Respondent [Rec. Vol. III, at p. 353]. Thus, Petitioner was not, as he suggests, "following the orders of Magistrates", but instigating them. He should hardly now be heard to invoke reliance upon *prior* judicial authorization.

Lastly, Petitioners assert they should not be responsible for attorney's fees because there "is no evidence in the record to show that either Petitioner Butler or . . . Peters authorized, directed or participated in the arrests, seizures or filing of criminal charges" [Petition, at p. 27]. In fact, as set out more fully hereafter, the court below did *not* award attorney's fees against Petitioners individually. Furthermore, at the "hearings" both the Assistant District Attorney and the police officers testified they had been "assigned" to

7 *Universal Amusement Co., Inc. v. Vance, Supra,* 559 F.2d at p. 1294.

perform their respective tasks by their superiors.[8] And, the mimeographed form orders furnished to the Magistrates by Petitioner Butler's office expressly provide that the "State of Texas" appeared through "the Criminal District Attorney of Bexar County, Texas [Petitioner, Butler] and his assistant" [Rec. Vol. III, at pp. 330-336]. In this regard, Texas has a specific statute making the criminal District Attorney responsible for the conduct of his assistants. [See: Powers and Duties of Assistant District Attorneys, Art. 326K-50, V.A.T.S. set out as Appendix E].

ARGUMENT

I. Younger Abstention

A. As To Petitioners' Claim That "Bad Faith" Cannot Be Inferred From Application Of The "Criminal Instruments" Statute To Ordinary Motion Picture Projectors On The Grounds That The Statute Was Judicially Uninterpreted.

NO HOPE OF OBTAINING FELONY "CRIMINAL INSTRUMENT" CONVICTIONS FOR POSSESSION OF ORDINARY 16 MILLIMETER PROJECTORS.

8 Assistant District Attorney Atwell testified at the July 2, 1974 hearing that he had "been assigned to conduct . . . the hearing", Officer Mena testified he had "receive[d] an assignment" and "was sent . . . to the theatre" for the purpose of initiating these procedures by his captain, and Officer Lewis testified he visited the theater "in line with [his] directives and orders" on "assignment".

Petitioners could have entertained no reasonable expectation of obtaining convictions on the spurious pretext that Dexter's possession of an "ordinary motion picture projector", admittedly used for Constitutionally protected activities [Admission, Rec. Vol. III, at p. 328] constituted the possession of a "criminal instrument . . . specially designed, made or adapted for the commission of an offense". As the unanimous Fifth Circuit panel opinion notes, the clear ". . . language of §16.01 must have dispelled any hope of obtaining Dexter's conviction"[9] and the "multiplicity of the seizures dispels the likelihood of an honest mistake". *Universal Amusement Co. Inc. v. Vance* (5th Cir. 1977) 559 F.2d 1286, at p. 1295, affirmed (*en banc*) 587 F.2d 176.

> "Charging the plaintiff with a § 16.01 violation with whatever motive the district attorney now would claim cannot have been undertaken with any design to actually convict the plaintiff of the crime. The articles which plaintiff possessed are stipulated to be ordinary 16 millimeter portable film projectors. Such a blatant use of an inappropriate statute, which bootstrapped the misdemeanor offense into a felony was effective in requiring that bail for a felony offense be set, not once but several times. The authorities could not believe, however, that Dexter would ultimately be convicted." *Universal Amusements Co. Inc. v. Vance* (S.D. Tex. 1975) 404 F.Supp. 33, at p. 48.

9 "As the lower court noted, the statute obviously applies to such items as jimmies and safecracking tools, the possession of which unmistakably indicates that criminal conduct is afoot." *Universal Amusement Co. Inc. v. Vance, Supra,* 559 F.2d at p. 1294.

PROSECUTIONS BROUGHT WITHOUT REALISTIC HOPE OF CONVICTION.

In short, the Petitioners undertook a bootstrapping transmogrification of the State's misdemeanor "commercial obscenity" statute into a felony offense, on the pretext that the possession of an ordinary motion picture projector constituted a "criminal instrument." The mere statement of the proposition defies logic. Appellants could have entertained no reasonable expectation of obtaining a valid conviction.

In *Younger v. Harris,* 401 US 37 (1971) itself, this Court noted that where, as here, there is a "substantial allegation" that the attempts ". . . to enforce the statutes against Appellants are not made with any expectation of securing valid convictions", a federal injunction against enforcement of those prosecutions would "properly issue". *Younger v. Harris, Supra,* at p. 48. See also: *Dombrowski v. Pfister,* 380 US 479 (1965) holding that where prosecuting authorities have invoked the criminal process "without any hope of ultimate success" then federal injunctive relief is warranted since any interpretation ultimately put on the statutes by the State courts is irrelevant, *Dombrowski v. Pfister, Supra,* at p. 490, and *Perez v. Ledesma,* 401 US 82, at p. 85 (1971) where this Court reiterated that "federal injunctive relief against pending state prosecutions is ap-

propriate" where, as here, prosecutions have been undertaken "without hope of obtaining a valid conviction".

WITHOUT INDICTMENT NO WAY DEXTER COULD DEFEND AGAINST STATE CHARGES.

In fact, Dexter here was faced with the worst of all possible situations. Like someone who has been indicted, Dexter had the disadvantage of facing multiple felony prosecutions under an inappropriate statute for what was in substance a misdemeanor, being required to make successive high felony bonds. While at the same time, like an individual who has not been arrested or charged [see: *Steffel v. Thompson*, 415 US 452 (1974)], Dexter had the disadvantage of being unable to vindicate his Constitutional rights since pursuant to State law [Texas Constitution, Article I, §10] a felony prosecution does not actually begin until a Defendant is indicted and consequently his remedies under State law were nonexistent.[10]

10 Petitioners' intimation that Dexter could have vindicated his Constitutional rights by requesting an examining trial, filing a motion to suppress, utilizing the so-called adversary "hearing", or the Writ of Habeas Corpus are unfounded. Under Art. 16.01, of the Texas Code of Criminal Procedure the purpose of an examining trial is to determine "amount and sufficiency of bail" and "probable cause" to bind the accused over to a grand jury. The Motion to Suppress is not available in felony cases until after indictment "on the trial of [the] criminal case". Art. 38.23, Texas Code of Criminal Procedure. The adversary hearing was for the purpose of determining "probable obscenity", *Universal Amusements Co., Inc. v. Vance*, 559 F.2d at p. 1295, and contrary to Petitioners' assertions, the Application for Writ of Habeas Corpus [Petition at pp. G-1, p. A149] was not to challenge the Constitutionality of the "Criminal Instruments Statute", but is the vehicle utilized in Texas for obtaining the "admission of prisoners to bail". Art. 11.64, Texas Code of Criminal Procedure.

Both the District Court below and the Panel opinion recognized that "through no fault" of Dexter, the Petitioner's failure to present these charges to the Grand Jury effectively "prevented him from defending himself in State Court". *Universal Amusement Co. Inc. v. Vance, Supra*, 404 F.Supp. at pp. 50-51,

> "What makes this case an even more compelling one is the district attorney's failure to seek grand jury indictments on the felony charges against Dexter, which has frustrated prompt adjudication of the propriety of state efforts to curb speech. See *Dombrowski v. Pfister*, 380 US 479 . . . . This prosecutorial inaction also implies that law enforcement officials recognized they were acting illegally and knew they could not obtain convictions on the felony charges." *Universal Amusement Co. Inc. v. Vance, Supra*, 559 F.2d at p. 1295.[11]

11 As one commentator recently noted: when "the local governmental units" disregard the Constitutional rights of their citizens and resist efforts to bring same within constitutional parameters, such conduct ". . . must be taken as evidence not of a case in which federal court intervention is inappropriate, but rather as one in which enforcement by the federal courts of the dictates of the fourteenth amendment against government units is most essential. Such cases provide not the exception to the federal jurisdiction, but the most basic reason for it." Developments in the Law — Section 1983 and Federalism, 90 Harv.L.R. 1133, at p. 1250 (1977).

B. As To Petitioner's Claim That They "Deliberately Withheld" Grand Jury Indictments On The Pending Felony Criminal Instruments Charges Because They Were "Judicially Intimidated" Into Believing If They Pursued The Indictments They Would Have Invoked Against Them The Contempt Powers Of The District Court.

Petitioner's now[12] argue that they had "no recourse" but to "deliberately withhold" indicting Dexter on the criminal instrument charges because they were "judicially intimidated" into believing that if they proceeded to indict Dexter they would "have invoked against them the contempt powers of the [District] Court". [Petition, p. 19].

In fact the Restraining Orders expressly stated that "no pending state criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases" [TRO of September 6, 1974, Rec. Vol. II, at p.

12 Apparently abandoning Petitioner's original contention that they had refrained from indicting Dexter because the restraining order prevented them from "arresting" Dexter and "that securing indictments against Dexter would necessarily have entailed arresting him in violation of the court's restraining order because . . . under Texas Law a capias must issue upon a grand jury indictment", *Universal Amusement Co., Inc. v. Vance, Supra,* 559 F.2d, at p. 1295. In fact, as the Court below noted, "Dexter's indictment would not have necessitated his arrest. Article 23.03(a) of the Texas Code of Criminal Procedure clearly makes issuance of a capias unnecessary when the indictee is under bond, as Dexter had been ever since his first arrest." *Universal Amusements Co. Inc. v. Vance,* 559 F.2d at p. 1296.

252] and both the District Court [*Universal Amusement Co. Inc. v. Vance* (S.D. Tex. 1975) 404 F.Supp. 33, at p. 50], the panel below [*Universal Amusements Co. Inc. v. Vance, Supra,* 559 F.2d at pp. 1295-6] as well as this Court on a prior appeal [*Butler v. Dexter,* 425 US 262, at p. 264, n. 6[13]] have noted same. The Temporary Restraining Orders enjoined only further "seizures" and "arrests" and in no way prevented the State from presenting the pending cases to the Grand Jury and proceeding to trial.

RECORD REFLECTS PETITIONERS UNDERSTOOD THEY WERE FREE TO INDICT AND PROSECUTE THE PENDING CASES.

Petitioners can hardly now claim that they were intimidated by the District Court from indicting Dexter on the pending criminal instrument charges when in fact it was clear from the outset that Petitioner's counsel understood that the managing judge had not enjoined them from prosecuting the pending felony cases [Rec. Vol. III, at p. 205, l. 16-25].

13 This Court has previously rejected Petitioner's contention noting:

> "Appellants argued below that the District Attorney believed he was precluded from pursuing those charges by the restraining orders issued by the federal court. However, the restraining order specifically provided that 'no pending state criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases'. The District Judge also informed the Appellants on at least two occasions during the hearings that the restraining order did not bar the bringing of indictments or any pending charges." *Butler v. Dexter, Supra,* at p. 264, n. 6.

"MR. BURRIS: Your Honor, could I ask one question? Now your prior temporary restraining order has *not been in such language as to refrain us from prosecuting our present criminal cases. It's been an injunction against further arrests and seizures of film.*

THE COURT: I don't think I am going to enjoin you from prosecuting these pending criminal cases . . . ." (emphasis supplied) [Hearing on August 12, 1974, Rec. Vol. III, at p. 205, l. 16-25].

Moreover, if there could have been any lingering doubt in Petitioner's mind same should have been put to rest when at the hearing before the Three Judge Court the managing judge admonished Petitioners that they knew very well the restraining orders did not in any way prevent them from presenting the felony indictments. [Rec. Vol. VIII, at p. 111, l. 1-16].

"MR. BURRIS: . . . [W]e have had a temporary restraining order on us since July forbidding (us) from indicting these people.

JUDGE SINGLETON: Not from indicting anybody. I'm sorry. That Temporary Restraining Order does not come close to saying that, and you know it and I know it . . . . I have never said a word about indictment and it specifically excludes pending criminal prosecutions. Sir, if you will just read it."

[Transcript of Hearing before Three Judge Panel on November 15, 1974, Rec. Vol. VIII, at p. 111, l. 1-16].

Yet, even after Petitioners were again specifically advised that the Restraining Orders did not prevent them from bringing felony indictments, they did not see fit to present same to a grand jury during the almost nine month period that transpired before the Opinion was entered in the District Court below.

And as for Petitioner's reliance upon the principals of the *Younger* doctrine, it was "the district attorney's failure to seek grand jury indictments on the felony charges against Dexter, which . . . frustrated prompt adjudication of the propriety of state efforts to curb speech". *Universal Amusements Co. Inc. v. Vance, Supra,* 559 F.2d at p. 1295; *Dombrowski v. Pfister,* 380 US 479 (1965). See also: *Fenner v. Boykin,* 271 US 240, at p. 244 (1926); *Judice v. Vail,* 430 US 327, at p. 337 (1977) [noting that "*Younger* principles would apply so long as (the State) system itself affords the opportunity to pursue federal claims within it"].

By refusing to bring indictments on the "pending" felony charges the Petitioners rendered ineffectual any possibility that those State proceedings could ". . . provide the federal Plaintiff with the necessary vehicle for vindicating his Constitutional rights". *Steffel v. Thompson,* 415 US 452, at p. 450 (1974). As the Supreme Court recently noted in *Trainer v. Hernandez,* ____ US ____, 52 L.Ed.2d 486, at p. 494, "[D]ismissal of the

federal suit 'naturally presupposes the opportunity to raise and have finally decided by a competent state court tribunal the federal issues involved' ".

> "The policy of equitable restraint expressed in *Younger v. Harris,* in short, is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights". *Trainer v. Hernandez, Supra,* 52 L.Ed.2d, at p. 494; *Kugler v. Helfant,* 421 US 117, at p. 124 (1975). See also: *Morial v. Judiciary Commission* (5th Cir. 1977) 565 F.2d 295, at p. 299 (*en banc*); *Ealy v. Littlejohn* (5th Cir. March 8, 1978) ____ F.2d ____, Slip 2626, at p. 2641, n. 40.

Here the District Court acted in a reasonable fashion, enjoining only *future* arrests under §16.01, leaving the Petitioners free to proceed with the pending "criminal instruments" cases already filed and affording the State courts an opportunity to resolve Dexter's Constitutional issues. See: *Wooley v. Maynard,* 430 US 705, at p. 760;[14] *Morial v. Judiciary Commission* (5th Cir. 1977) 565 F.2d 295 (*en banc*). However, by refusing to proceed with the pending prosecutions Petitioners effectively precluded Dexter from fully vindicating his

14 Similarly, in *Wooley v. Maynard, Supra,* 51 L.Ed.2d at p. 761 ". . . three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks".

federal rights in State Court, thereby undercutting the very principle of *Younger* that Petitioners now claim precludes federal intervention: that defense of a single State criminal prosecution will fully vindicate any federal Constitutional claims. *Younger v. Harris,* at p. 49.

> "The *Younger* principles simply are not what the defendants would have them be: a broad, discretionary device for the evasion of the responsibility of federal courts to protect federal rights from invasion by state officials." *Morial v. Judiciary Commission, Supra,* at p. 299.

C. As To Petitioners' Argument That *Hicks v. Miranda* Stands For The Proposition That Erroneous Application Of A Statute Should Not Infer "Bad Faith" [Petition, At pp. 12-15].

While Petitioners assert the Court below held that unconstitutional application of a statute "constitutes bad faith", per se, citing *Hicks v. Miranda,* 422 US 332 (1976), in opposition, neither case in fact stands for the proposition cited.

This Court in *Hicks* held that "the District Court was not entitled to infer official bad faith merely because it [concluded] . . . that the California obscenity statute was 'unconstitutional' on its face. "Otherwise, bad faith and harassment would be present in every case in which a state statute is ruled unconstitutional, and the

rule of *Younger v. Harris*, would be swallowed up by its exception".[15] *Hicks v. Miranda, Supra,* at p. 352.

Unlike *Hicks*, the court below did not "infer bad faith" *merely* because they determined the statute was unconstitutional on its face. Here, the courts cited a plethora of facts and circumstances in support of their unanimous conclusion that the statute was not only "unconstitutionally applied" but that it constituted a "blatant" use of a grossly "inappropriate statute". *Universal Amusement Co., Inc. v. Vance, Supra,* 404 F.Supp. at p. 48. And Petitioner's failure to indict Dexter deprived him of any meaningful opportunity to vindicate his Federal Constitutional claim in State Court.

D. As To Petitioners' Argument That "Appellants Should Not Be Charged With Bad Faith For Not Following A 'Practice Commentary' Which Has No Force Of Law And Which Was Not . . . Available To Appellants" At The Time.

Petitioners complain in their [Petition at p. 11] that "[B]oth the District Court and the panel chastised Petitioner for failing to follow the 'Practice Commentary' to §16.01 . . . [which] at the time of Dexter's arrests had not yet [been] distributed".[16]

15 A strong argument could be made that while an appropriate application of an statute unconstitutional on its face, standing alone, would not be an indication of bad faith, an application of a valid statute in an inappropriate and unconstitutional manner would be.

However, neither the trial court nor the panel opinion below held Petitioners were required to rely on or follow the "practice commentary".

Each court readily acknowledged that the "practice commentary" does not have the force of law and more importantly did not, as Petitioners suggest, "charge" them with bad faith for failing to "follow" same.

The unanimous panel of this Court noted, to the contrary, that the "commentary did no more than restate the *obvious* meaning of §16.01" which could under no circumstances support prosecutions brought on the theory that Dexter's possession of an ordinary motion picture projector constituted the possession of an instrument "specially designed, made, or adapted for the commission of an offense" thereby elevating conduct the State legislature had designated a misdemeanor to a felony. *Universal Amusement Co. Inc. v. Vance, Supra,* 559

16 In fact the "bound volumes" containing the practice commentary were published in "June 1974" [publication date at p. IV, Vol. 1, Vernon's Ann. Texas Penal Code] before the arrests and seizures in the instant case. Moreover, the language of the commentary cited by the courts, that ". . . things frequently used in crime, but which have common, lawful uses, are excluded from the purview of Section 16.01 because possession of such things, alone, is conduct too ambiguous for imposition of the criminal sanction", is taken verbatim from the "committee comment" to the Penal Code draft (commonly referred to as the "Blue Book") published and distributed to District Attorneys throughout the State, by West Publishing Company in October of 1970, some four years before the arrest or seizures in the instant case.

F.2d at p. 1294-95, n. 17. Citing: *Fronatt v. State* (Tex. Cr. App. 1976) 543 SW2d 140.

STATE'S HIGHEST COURT ADOPTED FEDERAL DISTRICT COURT'S OPINION.

Petitioners also complain that they should not be required to anticipate that the State's highest Criminal Court would adopt the District Court's opinion below [Petition, at p. 11]. However, as quoted above, the panel opinion below did no more than reiterate the obvious: that the Texas Court of Criminal Appeals agreed with the lower federal Court's determination that no one could have reasonably interpreted §16.01 to allow bootstrapping a misdemeanor into a felony prosecution for the mere possession of an ordinary motion picture projector.

As the Supreme Court noted in *Dombrowski v. Pfister*, 380 US 479 (1965), where prosecutions are brought under a grossly inappropriate statute without any realistic hope of obtaining a conviction ". . . the interpretation ultimately put on the statutes by the state courts is irrelevant. For an interpretation rendering the statute inapplicable to [the appellee] would merely mean that [he] might ultimately prevail in the state courts. It would not alter the impropriety of [the authorities] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants activities". *Dombrowski v. Pfister, Supra,* at p. 490.

E. As For Petitioners' Contention That Their Conduct Was Merely Good Faith Reliance On "Prior Judicial Authorization" [Petition, At pp. 13-15].

Petitioners' reliance upon the language in *Hicks v. Miranda, Supra,* at p. 351 [Petition, at pp. 14-15] is misplaced, since any prior "judicial authorization" amounted to merely filling in the name, date and place on the district attorney's mimeographed form. Petitioner Butler can hardly now claim to have relied in "good faith" upon prior judicial authorization, as it was Petitioner who initiated these proceedings and utilizing an almost identically verbatim "scenario" provided the magistrate with mimeographed form orders containing mimeographed verbiage directing the officers to seize the projectors as "criminal instruments" and to arrest the Defendant on felony charges [Admissions, Rec. Vol. III, at pp. 330-336 and Transcript of Hearing Before Three Judge Panel on November 13, 1974, Rec. Vol. VIII, at p. 121, l. 6-9]. On one occasion the Magistrate even had to inquire of the Assistant District Attorney as to which particular crime to charge Respondent [Rec. Vol. III, at p. 353]. Thus, Petitioner was not, as he suggests, "following the orders of Magistrates", but instigating them. He should hardly now be heard to invoke reliance upon *prior* judicial authorization.[17]

17 In other similar cases this Court has found the facts sufficient to warrant intervention [e.g., prosecutions brought "without realistic hope of obtaining a valid conviction"] in spite of some form of judicial authorization. *Dombrowski v. Pfister,* 380 US 479, at pp. 487-8 [search and arrest warrants].

Furthermore, the Court in *Hicks* was dealing within the conventional context of seizures of films under an obscenity statute, not seizures of projectors as "criminal instruments" and arrests on felony charges for an offense the Legislature had designated a misdemeanor.

II. Attorney's Fees

A. As To Petitioner's Contention That Prosecutorial Immunity Includes Immunity From Attorney's Fees.

NO AWARD AGAINST DISTRICT ATTORNEY INDIVIDUALLY.

Petitioner's misconstrue the opinion below when they argue that the "decision of the Fifth Circuit granting attorney's fees against a District Attorney for actions taken within the scope of his prosecutorial duties is in contravention of *Imbler v. Pachtman*" [Petition for Certiorari, at p. 24]. In actual fact the Court below made it abundantly clear that it was *not* awarding attorney's fees "against" District Attorney Butler, individually, and that ". . . if the district court decides to award fees against persons in their individual capacities, *it must respect the absolute immunity from money damages enjoyed by prosecutors* . . . as well as the qualified, good faith immunity possessed by other Government officers". [emphasis supplied] Citing: *Imbler v. Pachtman*, 424 US 409 (1976); *Universal Amusement Co., Inc. v. Vance, Supra*, 559 F.2d at p. 1301.

ATTORNEYS FEES AGAINST INDIVIDUAL

In fact, if Petitioners are arguing that absolute prosecutorial immunity includes immunity from attorney's fees against a prosecutor "individually", then they have no quarrel with the Court below, and no issue is here presented.

The unanimous panel opinion of the Fifth Circuit, *Universal Amusement Co., Inc. v. Vance, Supra*, 559 F.2d at p. 1301, as affirmed (*en banc*), 587 F.2d 176, explicitly held that:

> "Although . . . Congress intended to lift the veil of immunity from state and local governments to this limited degree . . . it [is] equally clear that the Attorney's Fees Award Act does not change judicially established rules governing individual *immunity* for unconstitutional acts committed by a person acting in official capacity. Thus, if the district court decides to award fees against persons in their individual capacities, *it must respect the absolute immunity from money damages enjoyed by prosecutors*, see: *Imbler v. Pachtman.*" *Universal Amusement Co., Inc. v. Vance, Supra*, 559 F.2d at p. 1301. See also: *Hutto v. Finney*, ___ US ___, 57 L.Ed.2d 522, at p. 540 (1978).[18]

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18 The opinion below, recognizing that the "Attorney's Fees Awards Act does not change judicially established rules governing individual immunity" and that the District Court "*must* respect the absolute immunity from money damages enjoyed by prosecutors", makes mention of fact that "any award of fees

ATTORNEYS FEES AGAINST THE GOVERNMENTAL UNIT

If on the other hand, Petitioners are arguing that a prosecutor's absolute immunity would preclude an award to a "prevailing party", of attorney's fees as "costs" against the Governmental entity in a suit for injunctive relief, then that issue was effectively put to rest by this Court just last term in *Hutto v. Finney*, ____ US ____, 57 L.Ed.2d 522 (1978). In *Hutto*, this Court upheld the award of attorney's fees against a prison official ". . . from funds of his agency . . . or from the State or local Government" without regard to any "good faith immunity" enjoyed by such prison officials[19] distinguishing the issue of attorney's fees against governmental entities from those against the

against individuals . . . may require a hearing by the district court to develop facts not contained in the record, such as the scope and nature of the prosecutor's action", [emphasis supplied] *Universal Amusement Co., Inc. v. Vance, Supra*, at p. 1301, and makes footnoted reference to the fact that this Court ". . . has not resolved the thorny question whether prosecutors enjoy absolute immunity for acts other than initiating and pursuing a prosecution". At p. 1301, n. 37. However, the issue is not yet "ripe" and there is nothing presented for review until the district court, on remand, passes upon such question, if presented in the context of a fully developed record. Indeed, what Petitioners are now seeking from this Court is essentially an advisory opinion. *International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 US 222, 224 (1954) ["Determination of the scope and constitutionality of (judicial rulings) in advance of its immediate adverse effect involves too remote and abstract an inquiry for the proper exercise of the judicial function"].

19 That same term in *Procunier v. Navarette*, 434 US 535 (1978), this Court held that such prison officials enjoy a qualified good-faith immunity from damages in civil rights action.

governmental official in his "individual capacity", *Hutto v. Finney, Supra*, 57 L.Ed.2d, at p. 540.[20]

IMMUNITY BARS DAMAGES NOT INJUNCTIVE RELIEF

Imbler v. Pachtman, 424 US 409, held "*only* that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983". [emphasis supplied] At p. 431.

It has long since been determined by this Court that such "immunity from damages does not ordinarily bar equitable relief". *Wood v. Strickland*, 420 US 308, at p. 315, n. 6 (1975); *Mitchum v. Foster*, 407 US 224 (1972); *Hansen v. Ahlgrimm* (7th Cir. 1975) 520 F.2d 768, at p. 769; *Boyd v. Adams* (7th Cir. 1975) 513 F.2d 83; *Timmerman v. Brown* (4th Cir. 1975) 528 F.2d 811; *Slavin v. Curry* (5th Cir. 1978) 574 F.2d 1256; *Hearing Aid Ass'n. of Kentucky, Inc. v. Bullock*, [E.D. Ky. 1976] 413 F.Supp. 1033. Thus, contrary to Petitioner's claim, a prosecutor's absolute immunity protects him "only from claims for money damages. It does not extend to plaintiff's action for injunctive . . . relief under Section 1983". *Timmerman v. Brown, Supra*, at p. 814; *Fowler v. Alexander* (4th Cir. 1973) 478 F.2d 694, at p. 696.

This Court in *Hutto v. Finney, Supra*, recognized that suits brought against individual officials "for injunctive

20 See also: *Davis v. Page* (S.D. Fla. 1977) 442 F.Supp. 258; *Alsager v. District Court of Polk City, Iowa* (S.D. Iowa 1977) 447 F.Supp. 572.

relief are for all practical purposes suits against the State itself", 57 L.Ed.2d, at p. 540. However, under Petitioner's reasoning the immunity doctrine would not preclude a civil rights suit for injunctive relief against a prosecutor, but would bar an award of attorney's fees, as "costs" to a "prevailing party" against the governmental unit. And that is precisely the kind of relief envisioned by the civil rights Attorneys Fees Awards Act and recognized by this Court in *Hutto v. Finney, Supra.* Such a theory of immunity would preclude awarding attorney's fees to a "prevailing party" against a governmental unit where the governmental official enjoyed a "qualified, good-faith immunity", unless it could be shown the official acted in bad faith. And this Court in *Hutto v. Finney, Supra,* expressly rejected such an interpretation of the "Attorneys Fees Awards Act". 57 L.Ed.2d, at p. 540, n. 32.

B. As To Petitioner's Claim That They Are Not Liable For Attorney's Fees Under The Doctrine Of Respondeat Superior.

Contrary to Petitioner's assertion [Petition at p. 27], the Court below did not ". . . impose vicarious liability for attorney's fees upon Petitioner under the doctrine of respondeat superior", rather, pursuant to the express dictates of *Hutto v. Finney, Supra,* it remanded to the District Court for a determination of "a reasonable attorneys fees as part of the costs" against the governmental entity, *Universal Amusement Co., Inc. v. Vance, Supra,* 559 F.2d, at p. 1300, n. 33 and (*en banc*) 587

F.2d, at p. 172, under the "Attorneys Fees Awards Act" [42 U.S.C. §1988].

Petitioners have confused a remand for attorney's fees as "costs" against the governmental unit with an award of money damages against the individual.[21] Respondents did not seek and the courts below did not award, monetary damages against Petitioners. Neither liability for damages nor attorneys fees against the individual Petitioners are at issue before this Court. No one has yet quarrelled with Petitioner's immunity. The only issue is whether the court below could remand for a determination of attorneys fees against the governmental entities under the "Attorneys Fees Awards Act". And that issue was decided affirmatively by this Court, just last term in *Hutto v. Finney, Supra.*

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21 Petitioner's reliance upon *Vinnedge v. Gibbs* (4th Cir. 1977) 550 F.2d 926; *Perry v. Jones* (5th Cir. 1975) 506 F.2d 778; *Fisher v. Volz* (3rd Cir. 1974) 496 F.2d 333; *Jennings v. Dobbs* (8th Cir. 1973) 476 F.2d 1271 and *Kostka v. Hogg* (1st Cir. 1977) 560 F.2d 37 for the proposition that the court "cannot impose vicarious liability for attorney's fees upon Petitioners under the doctrine of respondeat superior" [Petition at p. 27] is misplaced. Each of those cases dealt with liability for monetary damages, not attorney's fees and here the Court below merely remanded for a determination of attorney's fees to the "prevailing party" as costs against the governmental units, not under any theory of "respondeat superior", but pursuant to the provisions of the "Attorneys Fees Awards Act" expressly approved in *Hutto v. Finney, Supra.*

CONCLUSION

For the reasons herein stated the Petition for Writ of Certiorari should be denied.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above foregoing Brief for Respondent in Opposition has been mailed to Mr. Keith Burris, Assistant District Attorney, Bexar County, Texas, and Ms. Jane Macon, Assistant City Attorney, San Antonio, Texas, on this the ____ day of May, 1979.

Gerald H. Goldstein

APPENDIX A

§16.01, Texas Penal Code

(Applicable to 1974 Offense)

§ 16.01. Unlawful Use of Criminal Instrument.

(a) A person commits an offense if:

(1) he possesses a criminal instrument with intent to use it in the commission of an offense; or

(2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of an offense, he manufactures, adapts, sells, installs, or sets up a criminal instrument.

(b) For purposes of this section, "criminal instrument" means anything that is specially designed, made, or adapted for the commission of an offense.

(c) An offense under this section is a felony of the third degree.

APPENDIX B

§ 43.23, Texas Penal Code

§ 43.23. Commercial Obscenity.

(a) A person commits an offense if, knowing the content of the material:

(1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;

(2) he presents or directs an obscene play, dance, or performance or participates in that portion of the play, dance, or performance that makes it obscene; or

(3) he hires, employs, or otherwise uses a person under the age of 17 years to achieve any of the purposes set out in Subdivisions (1) and (2) of this subsection.

(b) It is an affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.

(c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this section, in which event it is a Class A misdemeanor.

APPENDIX C

SUBCHAPTER C.
ORDINARY FELONY PUNISHMENTS

Sec. 12.34. Third-Degree Felony Punishment

(1) An individual adjudged guilty of a felony of the third degree shall be punished by confinement in the Texas Department of Corrections for any term of not more than 10 years or less than 2 years.

(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $5,000. Amended by Acts 1973, 63rd Leg., p. 1125, ch. 426, art. 2, § 2, eff. Jan. 1, 1974.

APPENDIX D

SUBCHAPTER B.
ORDINARY MISDEMEANOR PUNISHMENTS

Sec. 12.22. Class B Misdemeanor

An individual adjudged guilty of a Class B misdemeanor shall be punished by:

(1) a fine not to exceed $1,000;
(2) confinement in jail for a term not to exceed 180 days; or
(3) both such fine and imprisonment.

APPENDIX E

Art. 326K-50
Vernon's Ann. Texas Statutes

Assistants and investigators; oath; powers and duties

Sec. 7. The Assistant Criminal District Attorneys of Bexar County, and the investigators, when so appointed, shall take the Constitutional Oath of office and the said Criminal District Attorney of Bexar County and his assistants shall have the exclusive right and it shall be their duty, to represent the State of Texas in all Criminal cases pending in any and all of the Courts of Bexar County, Texas, except in the Corporation Courts of the various cities and towns in Bexar County. Said Assistant Criminal District Attorneys of Bexar County are hereby authorized to administer oaths, file information, examine witnesses before the grand jury and generally perform any duty devolving upon the Criminal District Attorney of Bexar County, which assistants shall act subject to and under the direction of the Criminal District Attorney of Bexar County.